Nos. 19674-19680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19674

JOHN G. MOFFATT,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19675

MARY E. MOFFATT,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19676

JOHN G. MOFFATT and MARY E. MOFFATT,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19677

FRANK E. NICHOL,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

(Continued on Inside Cover.)

PETITIONERS' PETITION FOR REHEARING.

JOSEPH D. PEELER,
GERALD G. KELLY,
PETER C. BRADFORD,
MUSICK, PEELER & GARRETT,
621 South Hope Street,
Los Angeles, California 90017,
Counsel for Petitioners.

Of Counsel:
NUMA L. SMITH,
MILLER & CHEVALIER,
1001 Connecticut Avenue,
Washington 36, D. C.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

No. 19678

RUTH H. NICHOL,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19679

FRANK E. NICHOL and RUTH H. NICHOL,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19680

GEORGE G. MURRAY and ANNA MAE MURRAY,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

Nos. 19674-19680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19674

JOHN G. MOFFATT,

Petitioner on Review.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19675

MARY E. MOFFATT,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19676

JOHN G. MOFFATT and MARY E. MOFFATT,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19677

FRANK E. NICHOL,

Petitioner on Review.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19678

RUTH H. NICHOL,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19679

FRANK E. NICHOL and RUTH H. NICHOL,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19680

GEORGE G. MURRAY and ANNA MAE MURRAY,

Petitioners on Review.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITIONERS' PETITION FOR REHEARING.

The petitioners, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, respectfully request a rehearing of the decision of this Court entered on May 31, 1966, on the following grounds:

1. **The Decision Erroneously Concludes That the Liquidation of Moffatt and Nichol, Inc. Was Pursuant to a Plan of Reorganization.**

a. This Court's conclusion (Op. 4) that the so-called Howard plan was adopted by Inc.'s management is without support in the record. Significantly, the Tax Court did not include in its Findings of Fact any finding that anyone had communicated the "Howard plan" to any member of the management of either Inc. or Engineers. As was correctly pointed out in the dissenting opinion (Op. 10, fn. 1, at p. 12):

> "* * * The record does not disclose that the contents of the memorandum were communicated to the principals or anyone other than Mr. Kennedy. To the contrary, there is testimony that the contents of the memorandum were not communicated to the principals of Inc. or Engineers by anyone. The record does not disclose any action by the Board of Directors of either Inc. or Engineers upon the contents of the memorandum. * * *"

Not only is there no evidence that, prior to December, 1958, the management planned or even contemplated the liquidation of Inc., but the testimony of the officers was also clearly to the contrary. Furthermore, Howard, the author of the "plan," testified, without contradiction, that, upon learning that Inc. had acquired land and was proceeding with plans to construct a building thereon, he advised Kennedy that he felt Inc. should continue and that its liquidation was out of the question.

b. This Court's decision (Op. 6) that the Tax Court correctly concluded that the individual steps taken, beginning with the formation of Engineers and ending with the liquidation of Inc., were interrelated parts of an integrated plan of reorganization adopted in 1957

was manifestly in error. The patent facts—the insistence of Bobisch upon the creation of the new company, the continued business activities of Inc., its substantial investments in land and in building plans, the unforeseen deterioration of business conditions, the heavy losses sustained by the new company, and the fortuitous passage by Congress in August, 1958, of Sections 1371-1377 of the Technical Amendments Act of 1958, all of which occurred over a period of eighteen months—can rationally lead to no other conclusion but that these factors, and not the uncommunicated "Howard plan," caused the formation of Engineers in July, 1957, and the subsequent, unrelated liquidation of Inc. in December, 1958. It is abundantly clear from the undisputed testimony that the formation of Engineers and the liquidation of Inc., which was not even contemplated in 1957 and which was the result of unexpected developments late in 1958, were not parts of any plan of reorganization.

2. **This Court's Reliance Upon Revenue Ruling 57-518 Was Misplaced, for, Rather Than Supporting the Respondent's Case, That Ruling Compels a Holding for the Petitioners.**

The only authority which this Court cited in holding for the Respondent was Rev. Rul. 57-518, 1957-2 C.B. 253 (Op. 8-9). That Ruling held that where a corporation transfers 70 percent of its assets, such a transfer constitutes "substantially all" of the properties if the properties retained are approximately equal in value to the amount of the liabilities. In so holding, the Commissioner not only withdrew his previous nonacquiescence in the case of *Milton Smith, et al. v. Commissioner*, 34 B.T.A. 702, but also relied solely upon that case as the authority for the Ruling.

In the *Smith* case, after favorably citing several cases which had held that transfers of 80 percent or less of the properties were not transfers of "substantially all" the properties, the Court said (p. 706):

> "* * * All of these cases are distinguishable from the one before us. *In each of them there was retained a substantial amount of assets in proportion*

to the assets transferred and in none was the retention for the sole purpose of liquidating liabilities. In this case, as above pointed out, assets having a book value, in round figures, of $133,000 were transferred for stock worth $170,000; assets worth $52,000 (including the doubtful real estate) were retained for the purpose of meeting liabilities of $46,000. After discharging its liabilities—and this was done within the year—the outside figure of assets remaining with the petitioner would be $6,000, *which is certainly not an excessive margin to allow for the collection of receivables with which to meet its liabilities. No assets were retained for the purpose of engaging in any business or for distribution to stockholders. In these circumstances,* we are of the opinion that the assets worth $133,374.08 transferred to the Shaver Co. constituted "substantially all" the assets of the Smith Co. within the meaning of that statutory phrase and the transaction is non-taxable under section 112 (i)(1)(A). * * * [Emphasis added.]

In relying on the *Smith* case, the Commissioner said in Rev. Rule 57-518 (p. 254):

> "The instant case, of the assets not transferred to the corporation, no portion was retained by M corporation for its own continued use inasmuch as the plan of reorganization contemplated M's liquidation. Furthermore, *the assets retained were for the purpose of meeting liabilities, and these assets at fair market values, approximately equalled the amount of such liabilities.* Thus, the facts of this case *meet the requirements established in the case of Milton Smith, supra.*" [Emphasis added.]

Rev. Rul. 57-518 also specifically reaffirmed that portion of I.T. 2373, VI-2 C.B. 19, which held that, where a corporation transferred its manufacturing plant, consisting of land, buildings and equipment, and which approximated 75 percent of its assets, and retained only about 25 percent of its assets, consisting mostly of accounts receivable and a contract right to receive stock, that corporation had *not* transferred "substantially all" its assets.

Thus, both the *Smith* case and Rev. Rul. 57-518 hold that, where the circumstances are that the transferor corporation retains assets approximately equal to its liabilities and not for distribution to shareholders, a transfer of 70 percent of the assets will qualify as "substantially all." However, it is equally clear from reading those same authorities and I.T. 2372 that a transfer of 75 percent or less will not be "substantially all" if the retained assets are not approximately equal to the liabilities and are retained for distribution to the shareholders. In the instant case, the shareholders of Inc. unquestionably received and retained at least 35 percent of the *net* assets; thus, under the authority of Rev. Rul. 57-518, I.T. 2372, and the *Smith* case there could not have been a transfer of "substantially all" the assets to Engineers under these circumstances.

3. The Decision Is Contrary to Express Statutory Provisions.

This Court has previously held in *Pillar Rock Paving Co. v. Commissioner*, 90 F. 2d 949 (C.A. 9th), that a transfer of only 68 percent of the total assets was not a "transfer of substantially all the properties." See also: *Arctic Ice Machine Co. v. Commissioner*, 23 B.T.A. 1223; *C. I. Inv. Co. v. Commissioner*, 88 F. 2d 582 (C.A. 8th). In *Pillar Rock*, this Court said:

> "Petitioner contends that substantially all its 'properties' means substantially all its physical 'operating' properties. We believe no such limitation can be placed on the word 'properties'. The word must be taken in its ordinary sense, and as it is a comprehensive word it includes accounts receivable. If Congress had intended to restrict the meaning of the word, it would have done so."

The distinction of *Pillar Rock* in the decision herein (Op. 8, fn. 1 at p. 9) was clearly without substance, for, contrary to this Court's inference, a statute is subject to only one interpretation regardless of which party is seeking to come under or escape it. *Healy v. Commissioner*, 345 U.S. 278, 284-285. This axiom is no less true in cases involving the reorganization sections

which Congress necessarily meant to be similarly binding on both the taxpayers and the Commissioner. Likewise, while the words "capital gain" and "capital asset" are words of art subject to strict construction (with respect to all parties) ordinary words used in the revenue laws must be given their ordinary meanings even in those cases where such a construction results in allowance of capital gains to the taxpayer. *Commissioner v. Brown*, 380 U.S. 563, 570-571; *Malat v. United States*, 34 U.S.L. Week 4267 (U.S. Sup. Ct., March 21, 1966). See also: *Hanover Bank v. Commissioner*, 309 U.S. 672, 687.

Therefore, it was error for this Court to hold in the instant case that a transfer of, at most, 65 percent of the total assets was a transfer of "substantially all the assets", for this conclusion was contrary to the plain, ordinary meaning of those words in the statute. *Pillar Rock Packing Co. v. Commissioner, supra.*

It is therefore respectfully submitted that this petition for rehearing should be granted, and that, upon such rehearing, this Court's decision should be vacated and the judgment appealed from reversed; or, in the alternative, that upon the grant of rehearing, the case be set down for further hearing *en banc*.

Respectfully submitted,

JOSEPH D. PEELER,
GERALD G. KELLY,
J. PATRICK WHALEY,
MUSICK, PEELER & GARRETT,
Counsel for Petitioners.

Of Counsel,
NUMA L. SMITH, JR.,
MILLER & CHEVALIER,
1001 Connecticut Avenue,
Washington, D. C. 20036.

I am one of counsel for petitioners herein and I certify that in my judgment this petition is well founded and it is not interposed for delay.

JOSEPH D. PEELER